Supreme Court No. 79265-8
Court of Appeals No. 33240-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
A.C.
Appellant/Petitioner

Clallam County Superior Court
Cause No. 04-8-00333-9
The Honorable Judge George L. Wood

PETITIONER'S SUPPLEMENTAL BRIEF

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Petitioner

BACKLUND & MISTRY
203 Fourth Avenue East, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A.C. was charged in Clallam County Juvenile Court with three counts of Attempted Murder in the First Degree, one count of Taking a Motor Vehicle Without Owner's Permission in the Second Degree, one count of Assault in the Second Degree with a Firearm Enhancement, one count of Robbery in the First Degree with a Firearm Enhancement, and one count of Unlawful Possession of a Firearm in the Second Degree. CP 16-18.

The juvenile court retained jurisdiction, and A.C. was tried before a judge sitting without a jury. CP 7. The court found A.C. guilty on all counts. He was sentenced on June 15, 2005, and he appealed. CP 3, 7-15. The Court of Appeals upheld his convictions in a part-published opinion filed on August 22, 2006. *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006).

ARGUMENT

I. UNDER THE WASHINGTON CONSTITUTION, A JUVENILE CHARGED WITH VIOLENT AND SERIOUS VIOLENT OFFENSES MUST BE AFFORDED A JURY TRIAL.

Although charged in juvenile court, A.C. has effectively been treated as an adult and should have received a jury trial. The length of his sentence and the conditions of his confinement should not bear on his

constitutional right to have the facts of his case determined by a jury instead of a judge. An adult could not constitutionally be deprived of a jury trial simply by shortening her or his sentence and allowing it to be served in a quasi-rehabilitative setting. Since A.C. was treated as an adult in all ways except for the length of his sentence and the conditions of his confinement, he should have been granted a jury trial. The failure to do so violated Article I, Section 21 and Article I, Section 22 of the state constitution.

A. *Pasco v. Mace* and *State v. Schaaf* require jury trials for juveniles charged with violent and serious violent offenses.

When Article I, Sections 21 and 22 of the Washington Constitution were adopted in 1889, all juveniles were afforded jury trials.[1] Code of 1881, ch. 87, Section 1078. Interpreting those provisions nearly a century later, this Court held that "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." *City of Pasco v. Mace*, 98 Wn.2d 87 at 99-100, 653 P.2d 618 (1982). Critical to the Court's decision in *Pasco v. Mace* was the distinction between infractions and crimes.

---

[1] This practice endured until 1937. Laws of 1905, Ch. 18, Section 2; Laws of 1937, Chapter 65, Section 1.

Infractions, which the court considered "regulatory, rather than criminal in nature," were held exempt from the jury requirement. On the other hand, "those offenses which carry a criminal stigma and particularly those for which a possible term of imprisonment is prescribed" were required to be tried to a jury. *Pasco v. Mace*, at 100.

The Court found this same distinction significant when it upheld the statute denying juvenile offenders the right to a jury trial in 1987. *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987). According to the *Schaaf* Court, "[t]he penalty, rather than the criminal act committed, is the factor that distinguishes the juvenile code from the adult criminal justice system." *Schaaf*, at 7-8. In particular, the *Schaaf* Court took note of a statute providing that a juvenile adjudication is not a "conviction of crime." *Schaaf*, at 12, *citing* RCW 13.04.240. The other factors most relevant to the *Schaaf* Court included (1) the availability of diversion, (2) the incarceration in juvenile (as opposed to adult) facilities, (3) the "broad power" to provide for treatment, guidance, or rehabilitation, (4) the fact that (as of 1987) the juvenile system had not "utterly abandoned the rehabilitative ideal" and did not "embrace a purely punitive or retributive philosophy," (5) the persistence of "some degree of flexibility and informality" in juvenile proceedings, (6) the fact that juveniles were not (at that time) automatically fingerprinted and photographed, (7) the court's

ability to consider mitigating factors at sentencing, (8) then-existing limits on the use of juvenile records, and (9) the ability (at that time) to seal and/or expunge juvenile records. *Schaaf,* at 7-13.

Applying *Schaaf* and *Pasco v. Mace* to this case, A.C. should have been provided a jury trial. A.C. was tried for offenses that cannot be described as petty, either in terms of the acts committed or the penalties imposed. Three of his charges are classified as serious violent offenses, and two of them are classified as violent offenses. RCW 13.40.020; RCW 9.94A.030(41); RCW 9.94A.030(50). These five charges disqualified A.C. from participation in diversion, or any of the other rehabilitative programs that distinguish the juvenile system from its adult counterpart.[2]

Although minor offenses may still be dealt with in an informal, flexible manner geared toward rehabilitation rather than punishment (as the Court described in *Schaaf, supra, at* 8), the juvenile system's treatment of A.C. was more circumscribed. The standard range sentence imposed by

---

[2] As noted in Appellant's Opening Brief to the Court of Appeals and in A.C.'s Petition for Review to this Court, the charges made A.C. ineligible for Diversion or Youth Court (RCW 13.40.070, RCW 13.40.580 *et seq.*), Deferred Disposition (RCW 13.40.127), the Suspended Disposition Alternative ("Option B," RCW 13.40.0357), the Chemical Dependency Disposition Alternative ("Option C," RCW 13.40.0357, RCW 13.40.160 (4), and RCW 13.40.165), the Mental Health Disposition Alternative (RCW 13.40.160(5) and RCW 13.40.167), the Community Commitment Disposition Alternative Pilot Program (now expired, RCW 13.40.160 (6) and former RCW 13.40.169), or the Juvenile Offender Basic Training Camp program ("boot camp," RCW 13.40.320).

the trial court exceeded five years, far more than the five days (with four suspended) at issue in *Pasco v. Mace*. The trial court was statutorily permitted to consider mitigating factors; however, this does not distinguish A.C.'s case from charges brought against adults. *Compare* RCW 13.40.150 with RCW 9.94A.535.

Unlike the respondents in *Schaaf,* A.C. has been fingerprinted and photographed pursuant to RCW 10.64.110 and RCW 43.43.735, and has even provided a DNA sample as required by RCW 43.43.754. CP 7-15. Furthermore, it is possible that A.C. will be transferred to an adult prison to complete his sentence. RCW 13.40.280; *see also* RCW 13.40.285.

While RCW 13.04.240 still declares that juvenile adjudications are not criminal convictions (as it did in 1987), the statute does not have any legal effect on A.C. or his convictions, either within or outside of RCW Title 13. Furthermore, any effect it might have had is negated by RCW 9.94A.030(12), which defines "conviction" to mean "an adjudication of guilt pursuant to Titles 10 or 13 RCW [including] a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty."

In addition, A.C.'s records relating to these five offenses will never be sealed or destroyed, and there are no limits placed on their use. RCW 13.50.050. Moreover, these five offenses will be treated as adult convictions if A.C. ever gets in trouble as an adult. For example:

- He will be disqualified from participation in drug court and mental health court. RCW 2.28.170; RCW 2.28.180.

- He will be ineligible for the First Time Offender Waiver, the Drug Offender Sentencing Alternative, and the Work Ethic Camp program. RCW 9.94A.650; RCW 9.94A.660; RCW 9.94A.690.

- These five juvenile offenses will always be included in A.C.'s offender score; they will never "wash out." RCW 9.94A.525(2).

- If he is convicted of a serious violent offense as an adult, these five juvenile offenses will contribute 13 points to his adult offender score, just as if they were adult convictions. RCW 9.94A.525(9).

- If he is convicted of a violent offense as an adult, these five juvenile convictions will contribute 10 points to his adult offender score, just as if they were adult convictions. RCW 9.94A.525(8).

- If he is convicted of a nonviolent offense (other than a drug offense), these five juvenile convictions will contribute five points to his offender score, just as if they were adult convictions. RCW 9.94A.525(7).[3]

- If given community custody as part of an adult sentence, he will be subject to increased supervision by the Department of Corrections, even if his risk category as an adult is otherwise considered low. RCW 9.94A.501.

---

[3] The three serious violent offense convictions will also impact his offender score if he is convicted of drug offenses as an adult. Under RCW 9.94A.525(12), each prior drug offense will multiply when scored against a new drug offense. Without these juvenile convictions, the multiplication would not occur, and prior drug offenses would only count as single points in his criminal history. RCW 9.94A.525(12).

Thus, although the juvenile system as a whole has not "utterly abandoned the rehabilitative ideal" and does not "embrace a purely punitive or retributive philosophy," the balance struck for juvenile offenders charged with violent and serious violent offenders is identical to that struck for adult offenders. This is especially true given that the adult criminal system has taken steps toward a more rehabilitative model. *See, e.g,* RCW 2.28.170 (authorizing Drug Courts, enacted 1999); 2.28.180 (authorizing Mental Health Courts, enacted 2005); RCW 9.94A.660 (authorizing DOSA, enacted 1995); RCW 9.94A.690 (authorizing Work Ethic Camp, enacted 1993); RCW 9.94A.670 (authorizing Special Sex Offender Sentencing Alternative, enacted 1990). With two exceptions (the length of confinement and the place of confinement), the factors enumerated in *Schaaf* entitle A.C. to a jury trial under the Washington State Constitution. *See also Pasco v. Mace, supra.* Those exceptions are addressed next.

B. The length and conditions of an offender's confinement should have no bearing on the right to a jury trial under the Washington State Constitution.

Under *Schaaf,* it may be tempting to compare the length of A.C.'s confinement with the amount of time he would have received if convicted as an adult, or to contrast the rehabilitative aspects of juvenile sentencing with the punitive consequences in the adult system. *See Schaaf, at* 7-8.

These may be the correct comparisons for analyzing an equal protection claim; however, they should not be relevant under Article I, Section 21 and Article I, Section 22. Instead, A.C.'s case must be examined for those characteristics that require application of the state constitutional right. If those characteristics are present, the right applies, regardless of whether or not there is a rational basis for treating A.C. differently from an adult charged with the same offenses. *Pasco v. Mace, supra.*

Phrased in this light, the question becomes: could an adult be constitutionally treated the way A.C. was treated in this case? The answer is clearly "no," even if the adult criminal code were amended so that it more closely resembles the juvenile code. For example, even if the legislature renamed the criminal code the "rehabilitative code," declared that convictions under the rehabilitative code were not criminal convictions, shortened the maximum sentence allowed to five or six years, permitted judges greater flexibility in fashioning rehabilitative sentences, and sent offenders to serve their sentences in "re-education camps" rather than prisons, Article I, Section 21 and Article I, Section 22 would still require the state to afford adult offenders their constitutional right to a jury trial. *See Pasco v. Mace, supra.* Thus it should be irrelevant that A.C.'s sentence was less than the corresponding adult sentence, or that he may receive more appropriate treatment at the hands of the Juvenile

Rehabilitation Administration than he would from the Department of Corrections.[4]

For the same reason that every adult charged with a petty offense is entitled to a jury trial, our constitution should be interpreted to require jury trials for juveniles charged with serious violent offenses and violent offenses. A.C.-- convicted of attempted first-degree murder, second-degree assault, and first-degree robbery-- faces at least as much "criminal stigma" as the defendant in *Pasco v. Mace.* He has already served far more time in custody than did Mr. Mace, who was sentenced to five days in jail with four days suspended. *Pasco v. Mace,* at 88. Because he was denied his constitutional right to a jury trial, A.C.'s convictions must be reversed, and his case must be remanded to the superior court for a jury trial. *Pasco v. Mace, supra.*

This does not mean that we must "regress to territorial days and adopt a system where juveniles are treated like adult criminals and are afforded no special protections." *Schaaf,* at 15. It is possible to treat children as children-- offering rehabilitative opportunities, imposing

---

[4] The Court of Appeals found Dr. Trowbridge's report, quoted by the judge at sentencing, to be significant to the issue of whether or not A.C. was entitled to a jury trial. Similar reports are routinely entered in adult cases, recommending a reduced sentence such as DOSA. The lesser penalties and availability of appropriate treatment through DOSA or other such programs could not justify denying adults their right to a jury trial.

shorter sentences, and confining them in juvenile facilities-- while respecting their constitutional rights. The right to remain silent, the right to counsel, and the right to confront adverse witnesses do not require a regression to the "bad old days;" there is no reason why restoring the right to a jury trial should do so either.

II. A.C.'S ASSAULT CONVICTION MUST BE REVERSED AND COUNT II DISMISSED BECAUSE THE JUDICIAL DEFINITION OF ASSAULT VIOLATES THE SEPARATION OF POWERS.

The legislature has failed to define the core meaning of the crime of assault, and the judiciary has performed a legislative function by stepping in to fill this void. By abdicating its responsibility to define crimes and by forcing the judiciary to carry out a legislative function, the legislature has violated the constitutional separation of powers. The statutory and judicial scheme under which A.C. was convicted is unconstitutional.

A. The legislature must define the "core" of a criminal offense, and has failed to define the core of assault.

Article II, Section 1 of the Washington Constitution provides (in part) that "[t]he legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington..." Legislative authority includes "the substantive power to

prescribe crimes and determine punishments." *Ohio v. Johnson*, 467 U.S. 493 at 499, 104 S.Ct. 2536, 81 L.Ed. 2d 425 (1984); *see also State v. Calle*, 125 Wn.2d 769 at 776, 888 P.2d 155 (1995) ("the legislative branch has the power to define criminal conduct and assign punishment for such conduct..."). This power is exclusive to the legislative branch. *See, e.g., State v. Mundy*, 7 Wn. App. 798 at 800, 502 P.2d 1226 (1972) (" 'The legislatures of the several states have the exclusive, and inherent power to prohibit and punish any act as a crime...'"), *quoting* 22 C.J.S. Criminal Law Section 13 (1961) at 49; *State v. Swanson*, 16 Wn. App. 179 at 192, 554 P.2d 364 (1976) ("[i]t is, after all, the people themselves who elect legislatures to enact the statutes which command what is right and prohibit what is wrong... 'The power to determine what acts shall constitute crimes, and what acts shall not... belongs to the legislative branch of government. This power is said to be inherent in the state legislature and it is also comprehended in the general grant of legislative power contained in the state constitution. The power is exclusive and is not shared by the courts...'"), *quoting* 21 Am. Jur. 2d Criminal Law Section 14, at 95 (1965).

The legislature may not abdicate its legislative responsibility, or transfer its legislative function to another branch of government. *Larson v. Monorail Authority*, 156 Wn.2d 752 at 759, 131 P.3d 892 (2006); *see*

also Sackett v. Santilli, 146 Wn.2d 498 at 504, 47 P.3d 948 (2002) ("[T]he legislature may not grant this Court authority to perform a function that is reserved exclusively to the legislature by the constitution.")

Thus, under our system of government, "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76 at 95, 5 Wheat. 76, 5 L. Ed. 37 (1820); *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so because of our "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *United States v. R. L. C.*, 503 U.S. 291 at 305, 112 S.Ct 1329, 117 L.Ed. 2d 559 (1992) (plurality), *quoting U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515, 30 L.Ed 2d 488 (1971), *internal quotation marks and citations omitted.*

Nowhere in the criminal code has the legislature defined the term "assault." Instead, it has criminalized assault without specifying the prohibited conduct. *See* RCW 9A.36, *generally*. Most assaults are variations on a single theme: "A person is guilty of assault...[if] he or she assaults another." RCW 9A.36.041. Although the degrees of assault differ in their circumstances (i.e. assault with a deadly weapon, as in RCW 9A.36.021(1)(c), or assault of a law enforcement officer, as in RCW

9A.36.031(1)(g)), the core conduct-- the *actus reus*-- remains undefined.[5] In the absence of a legislative definition, the judiciary has defined the conduct constituting assault. *See* Appellant's Opening Brief in the Court of Appeals, pp. 23-28; *see also* Petition for Review, pp. 16-21. The legislature's abdication of responsibility and the judiciary's encroachment on a core legislative function violate the constitutional separation of powers. *Wiltberger, supra; Wadsworth, supra.*

B. The Court of Appeals Opinion incorrectly limits the legislature's responsibility to define crimes.

Because the legislature failed to define the core meaning of assault, the judiciary has stepped in to develop a definition, and has expanded the crime over the course of the last century. *See* Appellant's Opening Brief in the Court of Appeals, pp. 23-28; *see also* Petition for Review, pp. 16-21. In upholding this division of labor, Division II drew an analogy between the assault statute and those statutes defining the crimes of bail jumping, protection order violations, and criminal contempt. *See Chavez, supra, at* 666-668. According to Division II "The legislature's history of

---

[5] There are some sections of the statute, not applicable here, which specifically define the elements of certain types of assaults. *See, e.g.,* RCW 9A.36.011(1)(b): "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in RCW 70.24, or any other destructive or noxious substance."

delegating to the judiciary how statutes will be specifically applied demonstrates that the practice does not offend the separation of powers doctrine..." *Chavez*, at 667.

Division II's analogy is inappropriate. Bail jumping, protection order violations, and contempt require proof of an individual judge's case-specific action, such as setting a court date or entering a protection order. By contrast, the absence of a legislative definition of assault has required the judiciary as a whole to invent a definition applicable in all cases.

Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which A.C. was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice. *Wiltberger, supra.*

C. RCW 9A.04.060, which allows gaps in penal statutes to be filled with the common law, does not solve the problem.

RCW 9A.04.060, which provides that the common law "shall supplement all penal statutes of this state," may not be used to fill gaps in legislation where to do so would be "inconsistent with the Constitution." RCW 9A.04.060. By acknowledging the limitations imposed by the constitution, the legislature declared its intent not to delegate core legislative functions, since to do so would violate the separation of

powers.[6] Wash. Const. Article II, Section 1; *see State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). Thus by its own terms and through the action of the constitution, RCW 9A.04.060 does not allow the common law to supplement the criminal code in such a manner that the supplementation violates the constitutional separation of powers. An evolving common law definition of assault cannot be imported into the criminal code without violating our "instinctive distastes against [people] languishing in prison" without a clear statement from the elected legislature that they should. *United States v. R. L. C., supra,* at 305.

D. This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime.

It is the function of the legislature to define the elements of a crime. *Wadsworth, supra*, at 734. Division II's interpretation of *Wadsworth* is too narrow. According to Division II,

> When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime...
> *State v. David*, 134 Wn. App. 470 at 481, 141 P.3d 646 (2006), *citations and footnotes omitted.*

---

[6] Were this not so, criminal statutes would never be found void for vagueness, because any vagueness problems could always be solved by judicial intervention.

In some cases, merely listing the essential elements will adequately define the conduct constituting a crime.[7] But this is not such a case. The statute A.C. was accused of violating uses a circular definition: a person is guilty of assault if she or he "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c).

The problem with such circular definitions is that the core of the crime remains undefined, and the judiciary remains free to expand the crime (as it has done in the case of assault.) Indeed, without legislative action, appellate courts may continue to expand the definition of assault to cover more behaviors not currently criminal, and future defendants may find themselves accused of assault for making aggressive facial expressions. Or, again without legislative action, appellate courts could restrict the definition of assault, criminalizing only that conduct that was considered assaultive at the turn of the last century, and excluding actual battery.

---

[7] In fact, two examples of such crimes are found in the statute defining third-degree assault. Under RCW 9A.36.031 (1), a person is guilty of assault in the third degree if he or she "(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or... (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering..." Because these subsections adequately define the core conduct giving rise to criminal liability, they do not violate the separation of powers.

This court should adopt a rule that requires the essential elements of a crime to be defined with something more than a bare circular reference to the crime itself. In particular, greater clarity would be achieved if the legislature were required to define the verb or verbal phrase at the center of the *actus reus* requirement for a given crime. For example, the problems with RCW 9A.36 could be ameliorated with a statutory definition of the term "assault." The legislature has done just that in the theft statute. Like the assault statutes, the statutes criminalizing theft (RCW 9A.56.030 *et seq.*) declare that a person is guilty of theft if he or she commits theft. *See, e.g.,* RCW 9A.56.030, .040, .050. Unlike the assault statutes, however, the legislature has defined the term "theft." *See* RCW 9A.56.020. In the context of the theft statutes, this definition solves the circularity problem and complies with the constitutional separation of powers.

Because the legislature failed to define the crime with which A.C. was charged, his conviction is based on a statute that violates the constitutional separation of powers. *Wadsworth, supra.* The assault conviction must be reversed, and Count II must be dismissed with prejudice.

CONCLUSION

Juveniles charged with serious violent offenses or violent offenses must be afforded the right to a jury trial. Such juveniles face greater stigma, risk more severe punishments, and have fewer rehabilitative options than adults charged with petty offenses. Because our constitution requires jury trials for adults charged with petty offenses, the same protection must be given to juveniles facing convictions for violent and serious violent offenses.

Furthermore, A.C.'s assault conviction must be reversed and Count II dismissed. The legislature has failed to define the crime of assault, and the expanding judicial definition of that offense violates the separation of powers.

Respectfully submitted on August 8, 2007.

BACKLUND AND MISTRY

Manek R. Mistry, No. 22922
Attorney for the Appellant

Jodi R. Backlund, No. 22917
Attorney for the Appellant